

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL EDWARD HOLDA,

Defendant-Appellant.

UNPUBLISHED

June 21, 2016

No. 326728

Livingston Circuit Court

LC No. 14-022071-FH

Before: SAWYER, P.J., and HOEKSTRA and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of two counts of illegally delivering a prescription form, MCL 333.7401(1).¹ He was sentenced to 30 days in jail and 2 years' probation for each count. We affirm.

At the time of the trial, defendant was a Michigan-licensed physician with a controlled substance license issued by Michigan's Board of Pharmacy. The prosecution presented evidence that, after surrendering his drug enforcement administration (DEA) registration number, defendant wrote prescriptions for Flurazepam, a schedule IV controlled substance, MCL 333.7218(1)(a), on two separate occasions.

After the prosecution presented its proofs, defendant moved for a directed verdict, contending that, to be authorized to prescribe controlled substances in Michigan, MCL 333.7303² required only that a validly licensed physician also possess a controlled substance

¹ The information and judgment of sentence reference MCL 333.7401(2)(f), which provides the punishment for delivery of a prescription form in violation of § 7401(1). Although the information should have charged defendant with violating § 7401(1), the record shows that the parties clearly understood that defendant was alleged to have violated § 7401(1), and proceeded accordingly. Therefore, any error in the charging document is harmless. MCR 6.112(G).

² MCL 333.7303(1) requires a person who prescribes or proposes to prescribe a controlled substance in Michigan to "obtain a license issued by the administrator in accordance with the rules." "Administrator" means the "Michigan board of pharmacy or its designated or established authority." MCL 333.7103(2). MCL 333.7303(2) allows a person licensed by the administrator

license issued by the state Board of Pharmacy. Defendant met these requirements when he wrote the prescriptions at issue, and argued that the additional requirement of a DEA registration number arose under federal law, not state law. Therefore, defendant argued, his alleged violation was a federal issue that the prosecution was not authorized to pursue in a state court. The trial court denied defendant's motion, after which defendant asked the court to amend the proposed jury instruction, which stated that to prove the charge, the prosecution had to prove beyond a reasonable doubt that defendant (a) "knowingly delivered a prescription form[,]" and (b) that he "was not authorized by law to deliver the prescription form." Defendant asked for an amendment with respect to the second element to stress that the jury had to find that defendant violated "Michigan law," not just "the law." The trial court denied this motion as well.

Defendant argues on appeal that the trial court erred by denying his directed verdict motion and his request to amend the jury instructions. We disagree. We review de novo a trial court's decision on a motion for a directed verdict. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). We also review de novo claims of instructional error. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006), *aff'd* 482 Mich 851 (2008). When ruling on a motion for a directed verdict, the court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Szalma*, 487 Mich 708, 721; 790 NW2d 662 (2010).

MCL 333.7401 prohibits the delivery of controlled substances or of prescription forms in a way that is not "authorized by this article," i.e., the Controlled Substances Act (CSA), MCL 333.710 *et seq.*, Article 7 of the Public Health Code, MCL 333.1101 *et seq.* The CSA requires that prescription forms used by practitioners to prescribe controlled substances include the manually printed "prescribing practitioner's drug enforcement administration registration number." MCL 333.7109(5). A general purpose of the public health code is to protect the health, safety, and welfare of the people of Michigan. *People v Johnson*, 302 Mich App 450, 462; 838 NW2d 889 (2013). Therefore, it is reasonable to assume that the DEA registration number written on a prescription form must be valid. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009) (stating that statutory language should be construed reasonably, keeping in mind the purpose of the act).

Prior to defendant's motion for a directed verdict, the jury heard evidence that defendant had surrendered his DEA registration number in May 2013, subsequent to which he twice wrote prescriptions for Flurazepam, a Schedule IV controlled substance, which were filled at Family Fare Pharmacy. In addition, the jury heard the Family Fare pharmacist explain that prescription forms for controlled substances must bear the prescriber's DEA registration number. Although the pharmacist did not specifically state that defendant's invalid DEA number was on the prescription forms at issue, her testimony that prescription forms for controlled substances must bear the prescriber's DEA registration number, the fact that both prescriptions were filled, and the pharmacist's statement that she later discovered that defendant's DEA number was invalid

to prescribe controlled substances "to the extent authorized by its license and in conformity with the other provisions of this article."

support a reasonable inference that the prescription forms contained defendant's invalid DEA registration number. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993) (stating that "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime"). Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that defendant delivered a prescription form in violation of Michigan's CSA when he wrote an invalid DEA registration number on Whalen's prescription forms. *Szalma*, 487 Mich at 721. Based on the foregoing, we find that the trial court did not err by denying defendant's motion for a directed verdict. *Id.*

We also find that the trial court did not err in refusing defendant's requested amendment to the jury instruction. "A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *Id.* "[I]f an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *Id.*; MCL 769.26. We will not reverse a defendant's conviction unless, "after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Riddle*, 467 Mich at 124-125; MCL 769.26.

MCL 333.7303 provides that a licensed physician with a controlled substance license may prescribe controlled substances "in conformity with the other provisions of [the CSA]." MCL 333.7303(2). Ignoring the latter qualification, defendant claimed that his physician's license and controlled substance license allowed him to prescribe controlled substances in Michigan. However, everyone who testified to the requirements for prescribing controlled substances in Michigan, and whom defense counsel confronted with this statute, stated unequivocally that the prescriber needed a valid DEA registration number. No evidence supported defendant's theory that state law allowed him to prescribe controlled substances without a valid DEA registration number. In addition, to the extent that the proposed amendment implied a strict dichotomy between state and federal law, where in fact both bodies of law require prescribers of controlled substances to have a DEA registration number, 21 CFR 1301.11(a); MCL 333.7109(5), the amendment would have misled the jury by misrepresenting the law. Thus, because the evidence did not support defendant's theory, and the proposed amendment was misleading, we find that the court did not err by denying defendant's requested amendment. See *Riddle*, 467 Mich at 124; *People v Dembinski*, 62 Mich App 583, 589; 233 NW2d 662 (1975).

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder